THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS **SUPERIOR COURT**

State of New Hampshire

v.

David Gonsalves

No. 95-S-038

ORDER

Before the Court is defendant's Motion to Vacate Sentence. Defendant was sentenced by this Court (Manias, J.) after having been convicted by a jury on September 21, 1995, of criminal restraint, a class B felony. On December 27, 1996, the Court sentenced him to the New Hampshire State Prison for not more than 30 nor less than 10 years under the enhanced penalty statute, finding that the defendant "manifested exceptional cruelty or depravity in inflicting death or serious bodily injury on the victim of his crime." RSA 651:6(I)(d).

After the defendant was sentenced, two cases, one from the United States Supreme Court and the other from the New Hampshire Supreme Court, were decided that make it clear that the section of the enhanced penalty statute relied upon in this case cannot be imposed based upon a finding by the Court because, whether the defendant "manifested exceptional cruelty on depravity," is a "sentencing enhancement factor related to the offense itself."

State v. Ouellette, 145 N.H. 489, 491 (2000). Thus, it is an element of the offense that must be charged in the indictment and found by the jury beyond a reasonable doubt. Id.; Apprendi v. New Jersey, 120 S.Ct. 2348 (2000). The defendant first raised this issue at the time of sentencing, and the Court, (Manias, J.) rejected this argument. Although he did not raise the issue in a direct appeal of his conviction or sentence, he raised it through a Petition for Writ of Certiorari, which was treated as a Rule 7 appeal. Specifically, he alleged ineffective assistance of counsel for failure to appeal the sentencing issue directly. The Court (McGuire, J.) found that the defendant's counsel was not ineffective for failing to appeal the issue of the extended sentence, and the defendant did not appeal this decision to the New Hampshire Supreme Court. The issue presently before the Court is whether the rule expressed in Ouellette and Apprendi applies retroactively.

In Teague v. Lane, 489 U.S. 288 (1989), the United States Supreme Court held that a new rule of constitutional law will not be applied retroactively on collateral review of a case which is final unless the new rule falls into one of two exceptions: (1) the new rule "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe"; or (2) the new rule is "a watershed rule of criminal procedure which calls into question the fundamental fairness and accuracy of the proceeding that resulted in the conviction." Id.

at 311-312.

A new rule is created when "it breaks new ground or imposes a new obligation on the States or Federal Government," Teague, 489 U.S. at 301, and that occurs when "the result was not dictated by precedent existing at the time the defendant's conviction became final." Id. A rule is "new" when prior law did not dictate that the prosecution make such proof. See Jones v. United States, 526 U.S. 227 (1999). Based on these definitions, the rule announced in Apprendi and Ouellette is new. The question becomes whether it fits into either exception described above. The first exception is not applicable as this case does not involve any "primary, private individual conduct." See U.S. v. Gibbs, 125 F.Supp.2d 700, 703 (E.D.Pa. 2000). As to the second exception, the Court finds that the Apprendi and Ouellette rule is not "a watershed rule of criminal procedure which calls into question the fundamental fairness and accuracy of the proceeding which resulted in his conviction," and therefore, will not be applied retroactively.

The United States Supreme Court intended this second exception to apply "only to a small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty." O'Dell v. Netherland, 521 U.S. 151, 157, (1997) (citations and quotations omitted). "A rule that qualifies under this exception must not only improve accuracy, but also alter our understanding of the bedrock procedural elements

essential to the fairness of a proceeding." Sawyer v. Smith, 497 U.S. 227, 242 (1990) (internal quotation marks and citations omitted). As an example of a watershed rule of criminal procedure that would satisfy the second Teague exception, the Supreme Court has repeatedly referenced Gideon v. Wainwright, 372 U.S. 335 (1963), which affords defendants in all felony cases the affirmative right to counsel. See O'Dell, 521 U.S. at 167; Saffle v. Parks, 494 U.S. 484, 495 (1990).[1]

Since Teague, the United States Supreme Court has evaluated at least eleven new, or proposed, rules of criminal procedure against the second Teague exception, and in each case, has refused to apply the rule retroactively. See U.S. v. Mandanici, 205 F.3d 519, 529 (2nd Cir. 2000) cert. denied, 121 S.Ct. 190 (2000) (listing and briefly discussing each of these cases). For instance, new rules that have been held to not constitute watershed developments include a capital defendant's right to inform a sentencing jury that he is ineligible for parole if the prosecution argues that he is a future danger, O'Dell, 521 U.S. at

[1] In Cage v. Louisiana, 498 U.S. 39 (1990), the Supreme Court held that a jury charge that incorrectly lowered the reasonable doubt standard violated the Due Process Clause of the Fourteenth Amendment but did not address the issue of retroactivity. Several circuits have interpreted the rule in Cage as "watershed" and have applied it retroactively. See, e.g., Humphrey v. Cain, 138 F.3d 552 (5th Cir. 1999). The Supreme Court recently decided Tyler v. Cain, 121 S.Ct. 2478 (2001), and in the dicta, criticized the reasoning behind those circuit cases. See Tyler, 121 S.Ct. at 2484. It seems that when the issue is squarely presented to the Supreme Court, it will hold that the Cage rule does not apply retroactively.

167; a defendant's right not to have a jury consider certain invalid aggravating circumstances, Lambrix v. Singletary, 520 U.S. 518, 539-40 (1997); or the failure to instruct a jury that it could not convict a defendant if it found a mitigating mental state. Gilmore v. Taylor, 508 U.S. 333, 345-46 (1993).

Apprendi requires the jury to make findings of sentence enhancing elements that were previously made by the court during sentencing. Findings of these factors, whether by a judge or jury, impacts the length of the sentence and not the underlying determination of a defendant's guilt. The failure to follow Apprendi's dictates does not constitute error of the magnitude that would be generated, for instance, by the absence of counsel or by a biased judge. Gibbs, 125 F.Supp.2d at 706 (citing Neder v. United States, 527 U.S. 1, 9 (1999)). Although the Court could not locate any New Hampshire cases addressing the issue, the great majority of federal cases that have considered this issue have held that the Apprendi rule does not apply retroactively. See, e.g., Dukes v. U.S., 255 F.3d 912, 913 (8th Cir. 2001) (holding that petitioner could not raise Apprendi claims on collateral review because Apprendi does not announce a watershed rule of criminal procedure); Gibbs, 125 F.Supp.2d at 706 (holding that judicial determination of materiality element of a crime was harmless error because it did not call into question the validity of the verdict); U.S. v. Pittman, 120 F.Supp.2d 1263 (D.Or. 2000) (holding that Apprendi does not apply retroactively because it

does not directly relate to the accuracy of the conviction or sentence); see also, Mandanici, 205 F.3d 519 (rule of United States v. Gaudin, 515 U.S. 506 (1995), requiring submission of element of materiality to jury does not fall within second Teague exception). Based upon all of the above consideration, the Court finds that the rule announced in Apprendi does not apply retroactively. Accordingly, the defendant's Motion to Vacate Sentence is **DENIED**.

So Ordered.

DATED: December 27, 2001

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KATHLEEN A. McGUIRE,
Presiding Justice